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Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 771

E. A. TALIAFERRO,
Petitioner,
vs.
JULIA PRETTNER, WILLIAM T. MARCOLLO and LOUIS CANNELORA,
Respondents.

On Petition for Writ of Certiorari to the California District Court of Appeal, First District, Division One.

BRIEF FOR RESPONDENTS WILLIAM T. MARCOLLO AND LOUIS CANNELORA IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the California District Court of Appeal is reported at 135 Cal. App. (2d) 157, 286 Pac. (2d) 977; petition for rehearing, denied September 21, 1955; petition for hearing in the Supreme Court, denied October 19, 1955 (135 Cal. App. (2d) 161).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED.

Whether this Court has jurisdiction to review state Court proceedings where no federal claim was presented, considered or determined in the state Courts.

STATEMENT.

Petitioner filed in the Superior Court, Contra Costa County, California, a complaint seeking damages for alleged fraudulent misrepresentation, naming as defendants William T. Marcollo and Louis Cannelora (respondents herein) and one Julia Prettner (Aug. Clk's. Tr. p. 3).[1] Only respondents were served. Respondents filed general and special demurrers to the complaint,[2] (Aug. Clk's. Tr. p. 9) which the trial Court sustained, granting petitioner ten days to

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[1]References are to California District Court of Appeal, Clerk's Transcript and Augmented Clerk's Transcript.

[2]Among the grounds for demurrer respondents urged that the complaint alleged fraudulent misrepresentations by Carl and Martin Atalic who were not named as parties defendant (Aug. Clerk's Tr. p. 10), and that the complaint is "insufficient to constitute a cause of action against demurring defendants or either of them" (Aug. Clerk's. Tr. p. 9). In the opinion of the California District Court of Appeal (135 Cal. App. (2d) 157, 160) this defect was not cured in petitioner's amended complaint. Petitioner on January 20, 1956, however, filed a new action in the Superior Court which now names the Atalics as well as respondents as defendants. To the best of respondents' knowledge no service of summons upon this new complaint has been made or attempted.

amend (Aug. Clk's. Tr. p. 13). An amended complaint was then filed by petitioner which was in all respects identical with the original complaint except that two alleged causes of action set forth together in the original were separately stated in the amended pleading (Clk's. Tr. p. 6). Respondents moved to strike the amended complaint and for judgment of dismissal on the ground that the amendment was a mere repetition of the original pleading and was a sham and frivolous (Clk's. Tr. p. 13). Respondents gave the usual notice of hearing (Clk's. Tr. p. 13). Petitioner failed to appear at such hearing or to request leave to file any additional amendment of his complaint (Clk's. Tr. p. 15). The trial Court granted the motion to strike and entered judgment of dismissal (Clk's. Tr. p. 16).

Petitioner appealed to the California District Court of Appeal claiming that the trial Court's action was an abuse of discretion. The District Court of Appeal affirmed the judgment. Petition for rehearing was denied and petition for hearing before the California Supreme Court was likewise denied without opinion.

Notice of hearing of respondents' demurrer, motion to strike and for judgment, and of appeal before the District Court of Appeal was in each instance given to petitioner in accordance with California procedural requirements. Petitioner failed to appear at the hearing on any of those proceedings.

At no stage of the proceedings before the California Courts did petitioner raise any federal question or

claim any violation of rights under the Federal Constitution. In proceedings before the California Courts no federal question or specific provision of the Constitution or federal statute was presented, urged or determined.

ARGUMENT.

1. NO FEDERAL QUESTION IS PRESENTED.

Petition for certiorari herein must be denied for the reason that it fails to disclose any basis for this Court's jurisdiction under 28 U.S.C. 1257. It likewise fails to comply with the requirements of rules 23-1(d) and (f) in that it fails to specify with particularity the provision of the Constitution or federal statute which petitioner claims was violated by the state Courts.

The statute specifying the bases for this Court's review of state Court decisions by writ of certiorari is specific. The authorities are uniform that before such jurisdiction exists it must appear that a federal claim was seasonably presented and necessarily passed upon by the state tribunals.

In *American Surety Co. v. Baldwin,* 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98, it is stated:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it is urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was

denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

To the same effect see,

Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354, 359, 70 L.Ed. 305, 309, 46 S.Ct. 149;

Valley Steamship Co. v. Wattawa, 244 U.S. 202, 61 L.Ed. 1084, 37 S.Ct. 523;

Southwestern Bell Teleph. Co. v. Oklahoma, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528;

Whitney v. California, 274 U.S. 357, 71 L.Ed. 1095, 47 S.Ct. 641.

The burden of proving jurisdiction of this Court to review state Court proceedings is upon petitioner. *Gorman v. Washington University,* 316 U.S. 98-101, 86 L.Ed 1300, 62 S.Ct. 962. This burden petitioner here has failed to meet.

2. THERE HAS BEEN NO DENIAL OF CONSTITUTIONAL OR FEDERAL STATUTORY RIGHTS.

Petitioner asserts that he has not had his day in Court.[3] It is evident that petitioner's assertion is without merit. He was given notice of the time and place of hearing on respondents' demurrer to his original complaint and on respondents' motion to strike his amended complaint. He failed to appear at either of these proceedings. He was likewise given notice of hearing on the appeal before the California District Court of Appeal and failed to appear there. All these notices were given in accordance with California procedural requirements. Petitioner does not contend either that he received no notice of these hearings or that any such notice was inadequate or legally insufficient. Petitioner was therefore afforded opportunity to be heard and the proceedings are obviously in strict conformance with the requirements of procedural due process.

Dohany v. Rogers, 281 U.S. 362, 74 L.Ed. 904, 50 S.Ct. 299.

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[3]This contention was raised by petitioner for the first time in his application for a hearing before the California Supreme Court, without discussion, citation of any section of the Constitution or any federal statute or case authority. Such bare assertion is wholly insufficient to constitute presentation of a federal claim to the state Courts, or to afford basis for jurisdiction of this Court.

CONCLUSION.

As hereinbefore shown, the petition fails to disclose any basis for this Court's jurisdiction of the petition and for that reason the same should be denied.

Dated, San Francisco, California,
May 7, 1956.

Respectfully submitted,

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